

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs November 14, 2006

**STATE OF TENNESSEE v. ROY ALBERT IVEY**

**Direct Appeal from the Circuit Court for Blount County**  
**No. C-15717     D. Kelly Thomas, Jr., Judge**

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**No. E2006-00561-CCA-R3-CD - Filed March 30, 2007**

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The defendant, Roy Albert Ivy, pled guilty to the offense of theft of property greater than \$10,000 (a Class C felony) and agreed to be sentenced as a Range I offender, with the length and manner of service of the sentence to be determined by the trial court. After a sentencing hearing, the court sentenced the defendant to serve five years in the Department of Correction. The trial court found that confinement was necessary to protect society, to avoid depreciation of the seriousness of the offense, and to provide an effective deterrence to others. The trial court also found that the defendant's criminal history and failure at past efforts for rehabilitation made it necessary to order a sentence of confinement. The trial court did mitigate the defendant's sentence downward in the range from a sentence of six years to five years, based on his compliance with an alternative sentence in another county. After careful review, we conclude the trial court properly sentenced the defendant and find no error. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee; Raymond Mack Garner, District Public Defender; and Shawn G. Graham, Assistant Public Defender, for the appellant, Roy Albert Ivey.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Mike Gallegos, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Facts and Procedural History

In exchange for a sentence as a Range I offender, the defendant pled guilty to stealing a tractor and trailer from a former employer. At the sentencing hearing, the defendant testified that

he took the property as “collateral” for unpaid work he had performed for the victim. He testified that he planned to sell the tractor to get the money owed to him by the victim. The defendant acknowledged that, at the time of the sentencing hearing, he was serving an alternative sentence stemming from Knox County convictions for driving under the influence and reckless endangerment. He said that he was taking his alternative sentence seriously and that he was in compliance with its conditions. He also acknowledged that he had previously been placed in an alternative sentencing program, had violated the conditions of his probation, and was sent to prison for his violation. He served four years and eleven months on a five-year sentence for this prior violation. He contended that he was no longer drinking and using drugs, which he suggested were the root of his criminal behavior.

In contrast to the information contained in the presentence report, the defendant testified that he was not a member of the Aryan Brotherhood. He said that he had friends who were members of the organization but denied his own involvement with the group. He acknowledged that he had tattoos of Confederate flags on his back, United States flags on his arm, skulls and the word “redneck” on his belly, which were all made while he was in prison. He suggested that it was necessary to associate with other members of his race while he was incarcerated.

He stated that the Community Alternatives to Prison Program had helped him and that he had the support of his family to help him maintain a healthy and productive lifestyle. He asked the court for a sentence of probation so that he could continue his new lifestyle.

During cross-examination, the defendant was questioned extensively about his criminal history and acknowledged that he had seven prior felony convictions and nineteen prior misdemeanor convictions. He admitted that, since he reached the age of majority, he had committed and been convicted of a criminal offense each year. During re-direct examination, he testified that he had not been arrested in the year and seven months since the underlying arrest.

The trial court sentenced the defendant to five years and, based on his criminal history and failure at prior efforts at rehabilitation, denied any alternative sentence. The court placed emphasis on the fact that, since he had reached the age of eighteen, the defendant had been charged and convicted of a crime each year that he was not in confinement. The court indicated it was inclined to sentence the defendant to serve six years because of his history but, because of the defendant’s most recent efforts at rehabilitation, mitigated the sentence downward to five years.

### Analysis

On appeal, the defendant contends that the trial court erred in enhancing his sentence to five years and in denying him an alternative sentence. The State argues that the trial court properly sentenced the defendant to five years.

The defendant argues that the trial court did not give enough weight to the considerations of his most recent positive behavior, his efforts to change his life, and his positive work within the

supervision of the Community Alternatives to Prison Program. He specifically contends that his past criminal history was related to his problems with alcohol and asserts that he is sober and is succeeding in the structured and disciplined probation program in which he is participating. He suggests that a four-year community corrections sentence would be a more reasonable sentence.

Upon a challenge to the sentence imposed, this court must conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then the presumption is applicable and we may not modify the sentence even if we would prefer a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998). The burden of showing that a sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

The defendant pled guilty to a Class C felony as a Range I offender. He is therefore presumed to be a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). However, this presumption is not available to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, and has failed in past efforts at rehabilitation. Id. § 40-35-102(5); State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). During the sentencing hearing, the trial court specifically stated that the defendant’s prior criminal record and failure to obey the law after serving a considerable amount of time in the penitentiary made it necessary to impose a sentence of confinement. The trial court found that this defendant had a criminal history that showed a clear disregard for the law. The trial court also found that he failed in past efforts at rehabilitation and, specifically, that he resumed his criminal lifestyle shortly after serving a lengthy prison sentence. The evidence supports the denial of an alternative sentence. The trial court was within its discretion in denying an alternative sentence, and the defendant has not met his burden of showing that the sentence imposed is improper.

The trial court also noted that the defendant benefitted from being allowed to plead as a Range I offender though, based on his prior convictions, he was likely a Range II offender. The sentencing range facing the defendant would have been much greater if he had pled within his true range. Our supreme court has previously concluded that it is proper for a trial judge to look behind the plea bargain and consider the true nature of the offenses committed. State v. Hollingsworth, 647 S.W.2d 937, 939 (Tenn. 1983). A defendant convicted of a Class C felony as a Range I offender faces a sentencing range of three to six years. T.C.A. § 40-35-112(a)(3). Generally, a trial court should impose the minimum sentence within the range. T.C.A. § 40-35-210(c)(1). However, the sentence length should be adjusted within the range, as appropriate, by the presence of mitigating and enhancement factors. T.C.A. § 40-35-210(c)(2). Here, the defendant does not argue that the trial court improperly applied any enhancement factors. Instead, he argues that the trial court did not

place enough weight on his recent attempts to lead a crime-free lifestyle. The State argues, and we agree, that the weight to be afforded any existing and enhancement or mitigating factors is left to the discretion of the trial court. See State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). Therefore, we may not substitute our judgment for that of the trial court and must affirm the sentence as imposed.

#### Conclusion

Based on the foregoing and the record as a whole, we affirm the sentence imposed by the trial court.

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JOHN EVERETT WILLIAMS, JUDGE